

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-090400
	:	TRIAL NO. B-0806035-A
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
HURVEY FOUNTAIN,	:	
Defendant-Appellant.	:	
	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

On July 23, 2008, agent Timothy Nash from the Hamilton County Sheriff's Office's Regional Enforcement Narcotics Unit ("RENU") observed a truck hauling a trailer traveling eastbound on Interstate 74 in western Hamilton County. On top of the trailer was a gold-colored, 1997 Cadillac DeVille with Texas license plates. Agent Nash decided to follow the truck and soon observed a traffic violation. Nash stopped the truck, issued a warning to the driver, and proceeded to inform the driver that he was a RENU agent and that the Cadillac being hauled interested him.

The driver informed Nash that he was an employee of a transport company hired to haul the Cadillac from Mesa, Arizona, to Cincinnati, Ohio. The driver produced paperwork that satisfied agent Nash that the driver was telling the truth. Nash then asked if he could search the Cadillac. The driver consented to the search.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Agent Nash and another RENU agent, Anthony Lange, conducted the search of the Cadillac. While searching the trunk, the agents discovered a large quantity of marijuana, which was subsequently found to be in excess of 20,000 grams. After contacting RENU's headquarters, the agents asked the driver if he would be willing to participate in a "controlled call" to apprehend the suspect or suspects who were going to pick up the car and who presumably owned the marijuana. The driver agreed. After obtaining an address and phone number from one of the documents produced by the truck driver, the driver called the individual to whom the Cadillac was being delivered. The driver then told this person that the delivery had been delayed due to the truck overheating, but that he was currently in the vicinity and could deliver the Cadillac to a nearby automobile dealership where it could be picked up. Meanwhile, undercover law enforcement agents began surveillance at the dealership and at the address obtained from the documents given to Nash. Agents witnessed two individuals exit from a house at that address.

The truck driver arrived at the automobile dealership and delivered the Cadillac to the two individuals. One of the individuals was the defendant-appellant, Hurvey Fountain. Fountain was given the keys to the Cadillac, and he and the other individual looked in the trunk, completed some paperwork, and paid the driver. Immediately afterward, Fountain and the other individual were arrested.

Fountain was ultimately found guilty by a jury of trafficking in marijuana, possession of marijuana, and conspiracy. The trial court merged the possession-of-marijuana and conspiracy counts into the trafficking-in-marijuana count. It then sentenced Fountain to a mandatory eight years' confinement.² Fountain has timely

² See R.C. 2925.03(C)(3)(f) and 2929.14(A)(2).

appealed, asserting two assignments of error. We address Fountain's second assignment of error first.

In his second assignment of error, Fountain argues that the trial court erred when it admitted into evidence the State's exhibit 7A, the bill of lading given to the RENU officers by the truck driver. Specifically, Fountain argues that the bill of lading and all testimony related to it should not have been admitted because, first, the bill of lading was documentary evidence that was not authenticated, primarily due to the fact that the truck driver never testified at trial, and second because the bill of lading itself and the testimony related to it contained impermissible hearsay.

Evid.R. 901(A) states, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." By way of illustration, the rule provides the following: "Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be."³

The general definition of hearsay is given in Evid.R. 801(C), which states, " 'Hearsay' is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Unless there is an exception to the general definition, hearsay testimony is not admissible.⁴

Upon review of the record, including the State's exhibit 7A and the applicable trial testimony, it is clear that the document was properly admitted into evidence over Fountain's objection. Agent Nash's testimony reveals that the truck driver gave Nash the document. From the document, Nash was able to obtain a contact telephone number and address for the person the Cadillac was allegedly being delivered to. The document was not admitted into evidence "to prove the truth of the

³ Evid.R. 901(B)(1).

⁴ Evid.R. 802.

matter asserted;” therefore it was not hearsay. Further, Nash never testified that the document was in fact an actual bill of lading used by the delivery company. Although the term “this bill of lading” appears on the document, whether the document was an actual bill of lading used by the delivery company was not relevant. What was relevant was that the truck driver gave the document to Nash, and that it contained the contact’s telephone number that was used for the subsequent “control call” and the address that was used for surveillance purposes. As “[i]t is well established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed,”⁵ no authentication of the document was necessary. Under these circumstances, Fountain’s second assignment of error is overruled.

In his first assignment of error, Fountain argues that the trial court erred because it convicted him based upon insufficient evidence, and because it convicted him against the manifest weight of the evidence. Fountain argues that there was insufficient evidence to prove the elements of “possession” and “knowingly,” and that, therefore, the trial court erred when it overruled his Crim.R. 29 motion for a judgment of acquittal.

“The test [for the sufficiency of the evidence] is whether after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt.”⁶ Even if a reviewing court determines that a conviction is sustained by sufficient evidence, the judgment may be against the manifest weight of the evidence. When examining the manifest weight of evidence, a reviewing court “review[s] the entire record, weighs the

⁵ *State v. Thomas* (1980), 61 Ohio St.2d 223, 232, 400 N.E.2d 401.

⁶ *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.”⁷

Based on a complete review of the record, and considering the facts we have already discussed, we cannot say that Fountain’s conviction was not supported by sufficient evidence or was against the manifest weight of the evidence. Therefore, Fountain’s second assignment of error is overruled.

Although we have overruled each of the assignments of error, we note that the trial court failed to impose the mandatory fine⁸ and driver’s license suspension⁹ for Fountain’s second-degree-felony conviction for trafficking in marijuana. And because the record does not indicate that Fountain met the statutory prerequisites for avoiding the fine, the trial court’s omissions rendered the sentence void.¹⁰ We therefore vacate the sentence and remand the cause for resentencing only.¹¹

In all other respects, the judgment of the trial court is affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on May 5, 2010

per order of the Court _____.
Presiding Judge

⁷ *State v. Thompkins* (1977), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

⁸ See R.C. 2925.03(D)(1) and 2929.18(B)(1).

⁹ See R.C. 2925.03(D)(2) and 2925.03(G).

¹⁰ *State v. Fields*, 183 Ohio App.3d 647, 2009-Ohio-4187, 918 N.E.2d 204, at ¶8.

¹¹ *Id.*